

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JASON ALEXANDER PFAU,)
)
Plaintiff,)
)
v.)
)
PORTLAND POLICE BUREAU, a)
municipal corporation of the)
State of Oregon, and a)
political subdivision of the)
CITY OF PORTLAND, a municipal)
corporation of the State of)
Oregon, and PPB Officers)
CHRISTOPHER HUMPHREYS, JASON)
HARRIS, MICAH PERSONS, ROBERT)
BROWN, SGT. GEORGE DAVIS, and)
PPB Officer SCHERISE BERG-)
STROM, fka HOBBS,)
)
Defendants.)
_____)

No. CV-01-1060-HU

OPINION & ORDER

Randall Vogt
VOGT & CHIPMAN, P.C.
2061 N.W. Hoyt Street
Portland, Oregon 97209

Attorney for Plaintiff

/ / /
/ / /
/ / /

1 Mary T. Danford
2 Senior Deputy City Attorney
3 OFFICE OF CITY ATTORNEY
1221 S.W. Fourth Avenue, Room 430
Portland, Oregon 97204

4 Attorney for Defendants

5 HUBEL, Magistrate Judge:

6 Plaintiff Jason Pfau brings this civil rights action
7 pursuant to 42 U.S.C. § 1983 against the City of Portland and
8 several individual Portland Police Bureau Officers. The
9 allegations stem from Pfau's arrest on a domestic violence
10 charge on November 24, 2000. Plaintiff asserts that defendants
11 violated his Fourth Amendment rights by using excessive force in
12 effectuating the arrest.

13 In a May 28, 2002 Opinion and Order, I granted in part and
14 denied in part plaintiff's motion to file a Second Amended
15 Complaint. In his First Amended Complaint, plaintiff brought
16 supplemental state claims of battery and negligence in addition
17 to the section 1983 claim. In the motion for leave to file a
18 Second Amended Complaint, plaintiff sought to add state and
19 federal civil conspiracy claims, and an additional state assault
20 and battery claim.

21 For the reasons explained in the May 28, 2002 Opinion, I
22 granted the motion to add a section 1983 conspiracy claim
23 against the individual officers based on excessive force
24 allegations only. I also allowed plaintiff to add a municipal
25 liability claim against the City. I denied the motion to add an
26 additional state assault and battery claim. I also denied the
27 motion to the extent plaintiff sought to base the civil
28 conspiracy claim against the officers on allegations of false

1 police reports and false deposition testimony. I instructed
2 plaintiff to file a Second Amended Complaint in accordance with
3 my Opinion.

4 Instead of filing a Second Amended Complaint, plaintiff
5 inexplicably filed a Third Amended Complaint (TAC). I consider
6 it to be the Second Amended Complaint I ordered to be filed in
7 the May 28, 2002 Opinion. Plaintiff labeled Count II of the TAC
8 a section 1983 claim against the City and the individual
9 defendants. It also indicates that it is a claim for civil
10 conspiracy. Thus, rather than separating the allegations into
11 a section 1983 municipal liability claim against the City and a
12 section 1983 civil conspiracy claim against the individual
13 defendants, plaintiff has merged these separate claims, based on
14 separate theories, into one claim.

15 Defendant moves to dismiss Count II for failure to state a
16 claim under Federal Rule of Civil Procedure 12(b)(6). First,
17 defendant argues that the conspiracy claim must be dismissed
18 because plaintiff has failed to plead it with the required
19 specificity. Second, defendant argues that the municipal
20 liability claim must be dismissed because plaintiff has failed
21 to allege that the police officer defendants acted pursuant to
22 an unconstitutional custom, policy, or practice that was
23 deliberately indifferent to constitutional rights.

24 STANDARDS

25 On a motion to dismiss, the court must review the
26 sufficiency of the complaint. Scheuer v. Rhodes, 416 U.S. 232,
27 236 (1974). The court should construe the complaint most
28 favorably to the pleader:

1 In evaluating the sufficiency of the complaint, we
2 follow, of course, the accepted rule that the
3 complaint should not be dismissed for failure to state
4 a claim unless it appears beyond doubt that the
5 plaintiff can prove no set of facts in support of his
6 claim which would entitle him to relief.

7 Conley v. Gibson, 355 U.S. 41, 45-46 (1957); American Family
8 Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114,
9 1120 (9th Cir. 2002), petition for cert. filed, No. 02-163 (U.S.
10 July 29, 2002). The allegations of material fact must be taken
11 as true. Moyo v. Gomez, 40 F.3d 982, 984 (9th Cir. 1994).

12 DISCUSSION

13 I. Conspiracy Claim

14 Allegations contained in the TAC in support of the section
15 1983 civil conspiracy claim are:

- 16 (1) On or about November 24, 2002, Defendant
17 Police Officers, and each of them, while in
18 the process of arresting Plaintiff for an
19 alleged domestic violence offense, and
20 acting as a team and in concert with one
21 another, used excessive force, assaulting
22 and battering the Plaintiff while Plaintiff
23 was handcuffed[;]
- 24 (2) Defendant Police Officers met with each
25 other at a parking lot and formulated an
26 arrest plan[;]
- 27 (3) At all material times, the Defendant Police
28 Officers were engaged in a joint venture.
The individual officers assisted each other
in the performance of various actions
described and lent their physical presence
and support and authority of their office to
each other during the events.

TAC at ¶¶ 9, 11, 20. All of these allegations appear in the
"FACTS" section of the TAC. There are no allegations within
Count II that address the alleged conspiracy among the
individual defendants to use excessive force against plaintiff.

1 To sustain his section 1983 conspiracy claim, plaintiff
2 "must provide material facts that show an agreement among the
3 alleged conspirators to deprive [him] of his . . . civil
4 rights." Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998)
5 (allegations that a judge had joined a conspiracy with attorneys
6 in previous lawsuit against the plaintiff along with allegations
7 that the judge made erroneous decisions and granted motions
8 filed by the attorneys, were insufficient to support section
9 1983 conspiracy claim when there was no allegation in the
10 complaint, and no facts established on summary judgment, showing
11 an agreement between the judge and the attorneys).

12 Plaintiff must show that defendants intended to violate his
13 civil rights. See Kerr v. Lyford, 171 F.3d 330, 340 (5th Cir.
14 1999) (elements of civil conspiracy are (1) an actual violation
15 of a right protected under section 1983 and (2) actions taken in
16 concert by the defendants with the specific intent to violate
17 the aforementioned right); Williams v. Fedor, 69 F. Supp. 2d
18 649, 665 (M.D. Pa. 1999) (to sustain section 1983 civil
19 conspiracy claim, plaintiff must show actual violation of a
20 right and that actions were taken in concert with specific
21 intent to violate the right), aff'd, 211 F.3d 1263 (3d Cir.
22 2000).

23 Further, plaintiff must satisfy a "heightened pleading
24 standard" because defendants' "subjective intent is an element
25 of the alleged constitutional tort." Branch v. Tunnell, 937
26 F.2d 1382, 1386 (9th Cir. 1991). This standard requires that
27 plaintiff allege "nonconclusory allegations containing evidence
28 of unlawful intent." Id. The allegations may be supported by

1 either direct or circumstantial evidence, Harris v. Roderick,
2 126 F.3d 1189, 1195 (9th Cir. 1997), but they must "be specific
3 and concrete enough to enable the defendants to prepare a
4 response, and where appropriate, a motion for summary judgment
5 based on qualified immunity." Branch, 927 F.2d at 1386
6 (internal quotation omitted). However, the heightened pleading
7 "standard is not intended to be difficult to meet as it serves
8 the limited purpose of enabling the district court to dismiss
9 'insubstantial' suits prior to discovery," and allowing the
10 defendant to prepare an appropriate response or summary judgment
11 motion based on qualified immunity. Harris, 126 F.3d at 1195
12 (internal quotation omitted).

13 I conclude that plaintiff's TAC meets the standard. While
14 not the most clear of pleadings, the allegations contain the
15 assertion that the officers, acting as a team and in concert
16 with each other, used excessive force against plaintiff, that
17 they met and formed an arrest plan, and that they engaged in a
18 joint venture where they assisted in each other "in the
19 performance of various actions described" e.g., in the alleged
20 arrest and beating of plaintiff.

21 The allegations sufficiently allege that the individual
22 defendants (1) had an agreement (acting as a team, acting in
23 concert, formed an arrest plan, engaging in a joint venture),
24 (2) to violate plaintiff's civil rights (defendants used
25 excessive force acting as team and acting in concert, while in
26 a joint venture, they assisted each other in arresting plaintiff
27 and using excessive force against him), and (3) that they
28 intended to do so (they met and formulated an arrest plan).

1 Plaintiff has satisfactorily pleaded a section 1983 civil
2 conspiracy claim against the individual defendants.¹

3 II. Municipal Liability Claim

4 As noted, in the May 28, 2002 Opinion, I allowed plaintiff
5 leave to assert a municipal liability claim against the City in
6 accordance with Monell v. Department of Social Services of the
7 City of New York, 436 U.S. 658 (1978). The thrust of the
8 allegations in support of this claim in the TAC is that the
9 City has a policy or custom of tolerating the use of excessive
10 force by its police officers against handcuffed criminal
11 suspects, that this tolerance is a deliberate indifference on
12 the part of the City's policymakers to the constitutional rights
13 of City citizens, and that this tolerance caused the deprivation
14 of plaintiff's civil rights. See TAC at ¶¶ 3, 28-35.

15 Defendants move to dismiss this claim on the basis that it
16 is futile. Defendants contend that each allegation in support
17 of the claim fails to show deliberate indifference on the part
18 of the City. I disagree.

19 In contrast to the heightened pleading standard for the
20 civil conspiracy claim against the individual defendants, no
21 such higher standard is required in a section 1983 claim against
22 a municipality. Lee v. City of Los Angeles, 250 F.3d 668, 679

24
25 ¹ In the "INTRODUCTION" section of the TAC, plaintiff
26 alleges that the "defendant police officers and the City of
27 Portland conspired to cover-up the events" TAC at ¶
28 3. In the May 28, 2002 Opinion, I granted leave to plaintiff
to assert a section 1983 civil conspiracy claim against the
individual officers. To the extent that the TAC attempts to
allege a conspiracy claim against the City, it is dismissed.

1 & n.6 (9th Cir. 2001). Rather, what plaintiff must show to
2 sustain this claim is that (1) he was deprived of a
3 constitutional right; (2) the City had a policy; (3) the policy
4 amounted to a deliberate indifference to his constitutional
5 right; and (4) the policy was the moving force behind the
6 constitutional violation. Mabe v. San Bernadino County, Dep't
7 of Public Soc. Servs., 237 F.3d 1101, 1110-11 (9th Cir. 2001)
8 (internal quotation omitted).

9 Plaintiff alleges that his Fourth Amendment rights were
10 violated. TAC at ¶ 22. He alleges that the City had a policy
11 of inadequately and improperly investigating citizen complaints
12 of police misconduct such that acts of misconduct were
13 tolerated, that the City had a policy of permitting the
14 existence of a "code of silence" where police officers seldom
15 reported the use of excessive force of other officers, that the
16 City had a policy of inadequately supervising its police
17 officers which led to a failure to discourage constitutional
18 violations by police officers, and that the City ultimately had
19 a policy of allowing its police officers to use excessive force
20 against handcuffed criminal suspects. Id. at ¶¶ 29, 30, 31, 35.

21
22 Plaintiff further alleges that the City's policy exhibited
23 deliberate indifference to the constitutional rights of persons
24 in the City. Id. at ¶¶ 28, 33. Finally, plaintiff contends
25 that the policy or custom which exhibited deliberate
26 indifference to constitutional rights, caused the violation of
27 his rights. Id. at ¶¶ 28, 33. With notice pleading, and no
28 heightened pleading requirement, plaintiff has alleged all of

1 the requisite elements of a Monell claim against the City.

2 Defendants appear to assert that because plaintiff's
3 municipal liability theory is premised on the City's
4 acquiescence to a policy of excessive force, it cannot amount to
5 deliberate indifference. I reject this argument. See City of
6 Canton v. Harris, 489 U.S. 378, 397 (1989) (O'Connor, J.
7 concurring) (suggesting that municipal liability may be found
8 where officials acquiesce in, or "tacitly authorize" a pattern
9 of constitutional violations); Davis v. City of Ellensburg, 869
10 F.2d 1230, 1234 (9th Cir. 1989) (suggesting that with proper
11 evidence, plaintiff could sustain a municipal liability claim
12 based on a theory that the City acquiesced in police officers'
13 use of excessive force).

14 At this point, all I am determining is whether plaintiff has
15 stated a claim. I conclude that he has. Whether plaintiff can
16 sustain his municipal liability claim on summary judgment is not
17 before me and is left to another day.

18 CONCLUSION

19 Defendant's motion to dismiss (#60) is denied.

20 IT IS SO ORDERED.

21
22 Dated this 1st day of November,
23 2002

24
25 /s/ Dennis James Hubel

26 Dennis James Hubel
27 United States Magistrate Judge
28